NOS. 24-394, 24-396

In the Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA,
EX REL. OKLAHOMA,
Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA,
EX REL. OKLAHOMA,
Respondent.

On Writs of Certiorari to the Oklahoma Supreme Court

BRIEF OF AMICUS CURIAE JON R. MEADOR IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

Amicus is a practicing attorney, who taught Constitutional Law as an adjunct at Lincoln College, and is a scholar of early American religious history. More importantly, as a convert to Judaism from Catholicism, he is extremely concerned with this Court's theocratic trend. The historical basis for the Wall of Church and State is clear: no one should have to support another person's religious beliefs. No tax dollars can ever go into the teaching that "*The Jews killed Jesus*" or that "*Satan is the father of the Jews*." This Court is on the brink of violating two fundamental laws that would further religious bigotry. The first principle is the bar against providing taxpayer dollars directly to a religious institution. Second, while today the law is clear that the government may regulate that which it funds, this Court would soon discard that principle as well insisting that the government must stay out of religion. No child should ever be lied to and certainly no tax dollars should ever go to promote antisemitism. The undersigned's interest is to guide the Court back to the country's founding principles, namely, the Wall of Separation of Church and State.

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[1] Under Rule 37.6 of the Rules of this Court, amicus curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amicus curiae has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court's erroneous interpretation of the Free Exercise Clause in *Everson v. Board of Education*, giving religion a right to public welfare and labeling opposition to it as "discriminatory," was wrong from the start. Two years after this erroneous interpretation, eight members of the Court in *McCollum v. Board of Education* recognized its error and reversed *Everson* in part holding that the Establishment Clause's prohibition against all aid, of any kind, to any and all religions did not violate the Free Exercise Clause, thus, was not discriminatory. This grievance-based argument nevertheless survives. The Free Exercise Clause bars governments from prohibiting religious exercise. Nothing more. Denying public welfare is not religious discrimination. The Free Exercise Clause does not vest any affirmative right to public funds in religious institutions. Furthermore, the Constitution and the Establishment Clause erect a Wall of Separation of Church and State. This Court should return to this deeply embedded constitutional principle and hold that no government, national, state, or local, has the authority to make religion the subject of civic policy.

ARGUMENT

I. THIS COURT MUST RECOGNIZE THE LIMITS OF *EVERSON V. BOARD OF EDUCATION*.

This Court must stop expanding the application of *Everson* beyond its stated limits. Nothing in the text, history, or tradition indicates that a case involving the reimbursement of monies used for bus fare can now support the public funding of religious schools. In fact, everything in the text, history, and tradition bars Oklahoma from providing public monies to a religious schools. This Court in *Everson* addressed a very limited problem getting kids to school. The judges who believed that providing financial reimbursements to transport children to religious schools was constitutional also believed that the doctrine would never grow beyond that. The judges who opposed it knew better. History has proved the latter right.

Before continuing to expand *Everson*'s erroneous interpretation of the Free Exercise Clause, this Court should revisit its error. The complainant in *Everson* challenged a law that reimbursed money paid and advanced by parents for the transportation of their children to and from non-public, not-for-profit schools, religious schools. *See Everson v. Bd. of Educ.*, 39 A.2d 75, 75-76 (N.J. Sup. Ct. Sept. 13, 1944). In finding the reimbursement unconstitutional, the trial court held that the expenditures were an improper use of public funds. *See Everson*, 39 A.2d at 76 (citing *Rutgers College v. Morgan*, 70 N.J.L. 460, 474-475 and *Judd v. Bd of Educ.*, 278 N.Y. 200, 205-218 for proposition that state funds may not be used to aid religious schools either

directly or indirectly). The dissent believed that the reimbursement benefitted the child not the school (the "Child Benefit Theory"). *See id.* (citing, *e.g.*, *Bd. of Educ. of Baltimore Co. v. Wheat*, 199 A. 629, 629-642, which found reimbursements secure safe transportation). It also opined that since school attendance was mandatory and that parents could meet the educational requirement by sending their children to religious schools, then reimbursements made "educational facilities of their choice available to their children with a measure of safety." *See id.* at 77-78, 79 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)).

The appellate court found that the reimbursement lawful since it did not come out of the school fund. *See Everson v. Bd. of Educ.*, 44 A.2d 333, 336-337. It then went on to address the larger issue of whether the payment out of general funds for the transportation of children to any school, secular or sectarian, amounted to public aid to private entities. *See id.* at 337. Like the trial court dissent, the appellate court concluded that if parents could meet their educational duty to their children by sending them to a religious school, then reimbursing transportation costs was "a public matter and moneys expended therefor, except those prohibited by the constitution of the state, do not constitute the expenditure of public moneys for private purposes" again citing *Pierce. See id.* (citing 268 U.S. at 534-535)).

The dissent believed that if public monies could be used to reimburse transportation costs to a religious school, then "[t]here is no logical stopping point." *See id.* at 359. He believed that the Child-Benefit Theory was "an ingenious effort to escape constitutional limit-

ations rather than a sound construction of their content and purpose." Since every educational cost was reimbursable, then legislatures would be "free of constitutional restraint to provide for practically the entire cost of education in private and parochial schools." *See id.* at 360; *see also id.* at 360-367 (additional arguments and collecting cases).

This Court took the case and its initial position looked promising for appellants. All nine judges *held* that the "'establishment of religion' clause of the First Amendment means *at least this*:

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support *any* religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson v. Bd of Educ., 330 U.S. 1, 15-16, 31-33 (1946) (emphasis added) *rev'd in part by Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 & n.6-7 (1948) (basis of reversal discussed below). The Establishment Clause supports this definition and more. The plain text of the Free Exercise Clause, however, does not support what the Court was about to do next.

The Court, while maintaining its definition of the Establishment Clause, decided that if a government passed a law reimbursing bus fare with "tax-raised funds" to religious schools, then any opposition to that legislation discriminated against religion, thus, violated the Free Exercise Clause. Here is the erroneous interpretation: the government cannot "hamper its citizens

in the free exercise of their religion" by excluding them "from receiving the benefits of public welfare legislation." *See id.* at 16. What? While the Free Exercise is possibly the most ambiguous sentence in any legal document anywhere in the world, it does nothing more than to protect religion from government interference.[2] Nothing in the text, history, or tradition indicates that denying religion public funds "hampers" its free exercise or that religions have an affirmative right to public support.

The majority then went on to add that there was no requirement to provide religion with public benefits, but if it did, then the failure to do so somehow violated the Free Exercise Clause. *See id.* The Court seemed to draw this conclusion: legislatures may exclude religion from receiving public welfare, but if they include it, then excluding it is discriminatory.[3] This is pure nonsense: "The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such." *See id.* at 26 (Jackson, J. dissenting). In short, all a government has to do to circumvent the plain text of the Establishment Clause is to include religion in public welfare

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[2] Governments may not be able to "prohibit the free exercise," but it is too late in the day to argue that the government cannot regulate that which it funds. *See Wickard v. Filburn*, 317 U.S. 111, 131 (1942) (unanimous).

[3] Oklahoma did exclude religious institutions by law. *See* Okla. Stat. § 3-136(A)(2). Given this Court's holding in *Everson* that states may exclude religion from public-welfare legislation, Oklahoma's decision is unreviewable.

legislation, then claim discrimination when the legislation is challenged in court.

There is no reason to set out the arguments of the dissenters in *Everson* because the Court incorporated the dissenting position in the majority opinion in *McCollum* two years later. This Court corrected its mistake in *McCollum* by recognizing that this grievance-based understanding of the Free Exercise Clause was unconstitutional. A repentant Justice Black along with three other judges forming the slim majority in *Everson* plus the original dissenters agreed that the prohibition against the use of public funds to "aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings." *See McCollum*, 333 U.S. at 210-11 & n.6-7. Justice Black went out of his way to incorporate by reference the arguments advanced by *Everson*'s dissenters. *See id*. at 210-11 & n.6-7 Additionally, this Court rejected respondent's arguments that the Establishment Clause resisted incorporation to the states and that it "intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." *See McCollum*, 333 U.S. at 210.[4] Last, the Court also turned the *Pierce*-

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[4] As argued in more detail below, there is nothing in the text, history, or tradition that would lead any legal scholar to believe that the Establishment Clause prevents only the establishment of one religion. This strange interpretation appears to be a misunderstanding of James Madison's initial recommendation during the amendment process that "no religion shall be established by law." *See The Debates and Proceedings in the Congress of the United States*, 42 vols (Washington, D.C.: Gales and Seaton, 1834-1856) 1:757 (hereinafter "Annals"). Because it was written in passive voice, this recommended language would have

based argument on its head. The "State's compulsory public-school machinery" cannot be used to "provide pupils for religious classes." *See id*. at 212. *McCollum* gutted *Everson*.

In a concurring opinion, Justice Frankfurter outlined the secularization of public education over time beginning with James Madison's *Memorial and Remonstrance* and other scholarship illustrating that the secularization of education was not "imposed on unwilling states by force or superior law" or the product of the secularization of society but the recognition that public education had to be free religious controversy and entanglement. *See id*. at 214-15 (citing Rutledge, J. dissent in *Everson*, 330 U.S. at 36-37); *see generally id*. at 213-232 (citations omitted).[5] "[B]y 1875 the

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been applicable to the states. That it would apply to the states drew an objection from Peter Sylvester, who said the language would have "a tendency to abolish religion altogether." *See id*. That Madison might want to "abolish religion altogether" comes as no surprise to any Madisonian scholar, as he was no fan of religion, but given the objection, he offered to amend the language by adding the word "federal" before the word "religion," limiting the complete abolitionist goal to Congress *See id*. at 758. Reworded in the active voice, the recommended amendment now would have read, "Congress shall establish no religion by law." The word "no" means "not any" and "none." Johnson, *Samuel. A Dictionary of the English Language*. 1755, 1773, https://johnsonsdictionaryonline.com/ (hereinafter "Johnson's Dictionary"). None of this really matters, of course, because Madison's proposed language did not make it out of the committee. Madison's goal, however, was clear. He wanted to deny Congress the right to enforce the "legal obligation of [religion] by law." Annals, 1:758. The use of tax money for religious education is enforcing a legal obligation, obviously.

[5] It would be impossible to recite the entirety of Justice Frankfurter's non-partisan, objective, historical analysis, but this Court should defer to it because it was written at a time

separation of public education from Church entanglements, of the /state from the teaching of religion was firmly established in the consciousness of the nation." *See id.* 217 & n.6 (Blaine amendment unnecessary since "the 'provisions of the State constitutions are in almost all instances adequate on this subject[.]"). Certainly by 1868, the Separation of Church and State was deeply rooted in this Nation's history and tradition and explicit — not just implicit — in the concept of ordered liberty. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (identifying post-ratification and pre-Fourteenth Amendment trend in recognition of fundamental right to, in this instance, be free from religion).

It no more makes sense to believe that religion is entitled to taxpayer dollars because the First Amendment reads, in part, "Congress shall make no law . . . prohibiting the free exercise of religion" than it would to believe that the press is entitled to taxpayer dollars because the First Amendment reads, in part, "Congress shall make no law . . . abridging the freedom of . . . the press. . . ."

In short, this Court has been clear. Religion is outside the scope of government, and the application of the Establishment Clause to prevent religions from receiving tax dollars is not discriminatory. There is no discrimination. Every religion is treated similarly. The Constitution and the Establishment Clause bar any public support for religion.

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when religious institutions did not have the sort of hold on government they do today.

II. THE CONSTITUTION AND ESTABLISHMENT CLAUSE ARE NOT NEUTRAL TOWARD RELIGION.

The historical record is clear: the Framers authored a godless, secular Constitution in order to carve religion out of the Constitution and deny Congress "power over the subject." The Framers knew how to write a sectarian document. Eleven states drafted Constitutions prior to 1787, and most of them included religious tests for office and required religious professions of faith *See* Constitutions of South Carolina, March 26, 1776 Art. XXXIII (religious oath); Virginia, June 12, 1776, Art. 14 (religious toleration); Virginia June 29, 1776 (religious disqualification); New Jersey, July 2, 1776, Art. XIX ("no establishment of any one religious sect" but needed to be a "Protestant" to serve in government); Delaware, Sept. 21, 1776, Art. 22, 29 (required religious test, faith in "Jesus Christ" "no establishment of any one religious sect . . . in preference to another," religious disqualification); Pennsylvania, Sept. 28, 1776, §§ 2, 10, 44 (freedom of conscience, no involuntary monetary support, required religious test, belief that Old Testament and New Testament were divinely inspired, support for public schools without involuntary monetary support); Maryland, Nov. 11, 1776, Art. XXXIII, XXXIV, XXXV, XXXVI (power to "lay a general and equal tax" for religious support, voiding gifts of land to religious institutions, required religious test and oath); North Carolina, Dec. 18, 1776 Art. XIX, XXXI, XXXII (dictates of conscience, legal disqualification, required profession in "truth of the Protestant religion"); Georgia, Feb. 5, 1777, Art. XIV, XXIV, XXX (religious oath, representatives must be Protestant, legislature could support religious teachers, religious disqualification); New York, Apr. 20, 1777,

Art. XXXVIII, XXXIX, XLII (government must "guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes," religious disqualification, oath renouncing "all and every foreign king, prince, potentate, and state in all matters, ecclesiastical as well as civil"); Delaware Sept. 21, 1776, Art. 22, 29 (religious oath belief in God, the Son, and the Holy Ghost, New and Old Testament divinely inspired), South Carolina, March 19, 1778, Art. XXI, XXXVI, XXXVIII (required religions test, belief in "future state of rewards and punishments," public worship of God, divine inspiration of Old and New Testament, limited free exercise to "Christian Protestants," no involuntary financial support);[6] Massachusetts, March 2, 1780, Art. II, (required religious test, gave legislature power to provide for Protestant teachers, "no subordination of any sect or denomination").

The United States Constitution had none of that. There was no religious test, the phrase "so help me god" was omitted from the presidential oath, and there was no mention of the Framers' God, "the God of Nature and Nature's God," and "the Great Governor of the World." Nothing. Zero, zip, zilch. Soon-to-be Associate Justice James Iredell explained why. Arguing for the adoption of the Constitution during North Carolina's Ratifying Convention, Iredell defended Article VI of the Constitution by reminding "the least conversant in the history of mankind" of the "utmost cruelties," intolerance, persecution, divisive-

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[6] To see the secular influence the United States Constitution had on the states compare, *e.g.*, South Carolina's Constitution of March 19, 1778, with its Constitution of June 3, 1790, drafted after the ratification of our godless, secular Constitution.

ness, and the "wars of the most implacable and bloody nature" exercised in the name of religion.[7] *The Debate on the Constitution*, *Debates in the State Ratifying Conventions*, vol. II, 903-904, The Library of Congress, Bernard Bailyn, editor, The new government had no power over the subject and "no authority to interfere in the establishment of any religion whatsoever." *See id*. at 904. In language mirroring the Establishment Clause, Iredell added, "If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass by the Constitution, and which the people would not obey." *See id*.

This is binding. The Framers were clear: Religion can never be the engine of civic policy, and the United States is not a Christian Nation.

Joseph Story agreed: The No-Religious Test Clause "had a higher object: to cut off for ever every pretense of any alliance between church and state in the national government." *Commentaries on the Constitution of the United States*, book 3, ch. 43, § 1841. Article VI did not bar only an alliance between church and state but "every pretense" of one. There is no difference between "to cut off for ever every pretense of any alliance between church and state," "no law respecting an establishment of religion," and Wall of Separation Between Church and State. None of these is limited to just to an alliance between church and state or just one establishment. Religion can never be the engine of civic policy. Funding religious schools requires legislation. Legislators, however, lack jurisdiction over the subject.

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[7] This Court cited the same religious strife, controversy, and bloodshed in *Everson*. *See* 330 U.S. at 8-15.

See Memorial and Remonstrance against Religious Assessments, II Writings of Madison, at 187 ("Religion is wholly exempt from [the] cognizance" of "Civil Society"; therefore, "if Religion is exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body.").[8]

The meaning of the Establishment Clause was no different than the meaning of Article VI, according to Story. He noted that the Establishment Clause was enacted to keep religion out of government: "*The real object of the amendment was*, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent *any* [not just one] national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government." *See id.* § 1871 (emphasis added); *id.* § 1873 (given "dangers from ecclesiastical ambition, the bigotry of spiritual pride,

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[8] There is no doubt that if Patrick Henry had proposed a bill withdrawing public funding from Christian school teachers and James Madison had remonstrated against it, the Conservatives on this Court would find Madison's opinion dispositive. Madison believed, however, that religion and government did not mix. Even George Washington opposed Henry's bill and said so in a letter dated October 3, 1785, to George Mason saying "no man's sentiments are more opposed to any kind of restraint upon religious principles than mine are; yet I must confess, that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denominations of Christians; or declare themselves Jews, Mahometans or otherwise, & thereby obtain proper relief." "From George Washington to George Mason, 3 October 1785," Founders Online, National Archives, https://teachingamericanhistory.org/gba7. If people want to send their children to a religious school, they can pay for it, Washington said.

and the intolerance of sects . . . that it was deemed advisable to exclude from the national government *all power to act upon the subject*") (emphasis added). The godless, secular document and the Establishment Clause were to place every religion on the same level thus ensuring there was no preference for one or the other. Religion can never be the engine of civic policy.

Last, as for the Establishment Clause, the two most difficult words in the Establishment Clause are "respecting" and "establishment," but every word can be defined. "No law respecting" simply means that Congress can pass no statute looking to or looking toward doing something. *See Johnson's Dictionary* (definition of "law" and "respect"). "No law," again, means "no law," "none. *See id*. Whatever is on the other side of the word "respecting" is off limits. The word "establishment" is the noun form of the verb "establish" which means to set up or to fund. *See id*. Johnson uses this example: "His excellency, who had the sole disposal of the emperor's revenue, might gradually lessen your establishment." *Johnson's Dictionary* (citing Jonathan Swift). Said differently, the government, which has the power of the purse, might eliminate your establishment. *i.e.*, funding. Additionally, the words "respect," "respecting," "establish" and "establishment" are used hundreds of times in the Federalist Papers to mean "with respect to," "concerning," "having something" to do with" and "to create" and "to set up." In short, Congress shall make no law concerning, with respect to, looking to create, looking to set up, or looking to fund religion — any religion.

The Establishment Clause means what this Court in *McCollum* said it means.

CONCLUSION

The grievance-based expansion of the Free Exercise Clause in *Everson* is clearly erroneous. There is nothing in the text, history, or tradition indicating that the Free Exercise Clause means it is entitled to public funding. That religion was taught in schools prior to 1787 is irrelevant to the determination of what the words on the page mean. Religion can never be the engine of civic policy.

Respectfully submitted,

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